Zung Zang Trading Sdn Bhd v Kwan Hung Cheong & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-57–07 OF 2019(S)
ROHANA YUSUF PCA, ZAWAWI SALLEH AND ABDUL RAHMAN SEBLI FCJJ
16 APRIL 2021

Companies and Corporations — Meetings — Extraordinary general meeting ('EGM') — Whether holding company which wholly owned subsidiary was entitled to requisition EGM of the subsidiary — Whether resolutions passed at the EGM were valid — Whether authority to act of corporate representative under s 147(3) of the CA should not be unduly curtailed by construing that section restrictively — Whether wider interpretation should be given so that acts of corporate representative which did not offend or were not inconsistent or incompatible with s 147(3) should be allowed — Whether corporate representative's act of requisitioning EGM of subsidiary on behalf of its sole owner was not one that offended s 147(3) of the CA — Companies Act 1965 ss 152(A) and 147(6)

At all material times, the respondents were the only directors of the appellant ('ZZ') which was a wholly owned subsidiary of another company ('KCHSB'). Sometime after 3 June 2003, fraudulent share transfers caused the shareholding of ZZ to fall into the hands of the respondents. On discovering the fraud, KCHSB sued the respondents in the High Court to regain its full ownership of ZZ. The High Court held that KCHSB was the legitimate and beneficial owner of all the issued shares in ZZ and ordered the register of members of ZZ to be rectified to reflect that position pursuant to s 162 of the Companies Act 1965 ('the CA'). The High Court's decision was affirmed on appeal by both the Court of Appeal ('COA') and the Federal Court ('FC'). In affirming the High Court's decision, the FC had further ordered ('the FC order') that: (a) the shareholding of ZZ be restored to the position it was in on 3 June 2003, ie, before the aforesaid fraudulent share transfers took place; (b) all transfers and allotment of shares in ZZ's capital on or after 3 June 2003 be cancelled and be of no effect; and (c) the register of members of ZZ be rectified pursuant to s 162 of the CA to reflect the terms of the FC order. The respondents, however, never took any steps to rectify the register of members of ZZ to accord with the FC order. Soon after the FC order was delivered, KCHSB, pursuant to s 147(3) of the CA, passed a directors' circular resolution appointing its corporate representative ('PW1') to attend and vote at all general meetings of ZZ and to exercise such powers that KCHSB had power to exercise as if it was an individual member of ZZ. PW1 issued a notice calling for an extraordinary general meeting ('EGM') of ZZ to pass a resolution to, inter alia, remove the

respondents as ZZ's directors, appoint PW1 and two others (all of whom were the only directors of KCHSB) to be the new directors of ZZ and to appoint PW1 as the governing and managing director of ZZ. After the High Court declared the resolutions passed at the EGM invalid on account of a technical non-compliance, PW1 issued a fresh requisition notice to the board of directors of ZZ for a second EGM. According to the first respondent, the second EGM was aborted due to insufficient quorum. However, PW1 asserted that he chaired and proceeded with the EGM and the majority shareholders resolved to, inter alia, remove the respondents as directors of ZZ forthwith. To enforce the resolutions passed at the EGM, ZZ applied to the High Court for various orders against the respondents. The High Court granted the orders sought and held that PW1 was entitled to requisition for the EGM since KCHSB, whom he represented, wholly owned ZZ. The court also held that the resolutions passed at the EGM were valid pursuant to ss 152(A) and 147(6) of the CA. In setting aside that decision, the COA held that for KCHSB to validly requisition for the EGM through PW1, it had to be shown that KCHSB wholly owned ZZ but this fact was not proven by ZZ especially as its register of members did not reflect that position (the FC order did not explicitly state that KCHSB was the 100% owner of ZZ but merely that ZZ's shareholding should be restored to the position it was in as at 3 June 2003). The COA also held that PW1's authority as KCHSB's corporate representative was only to 'attend and vote' on its behalf at any meeting of a company in which KCHSB was a member and did not include the power to requisition for an EGM. The COA consequently found that all resolutions passed at the second EGM were invalid and unenforceable against the respondents. In the instant appeal against the decision, the appellants submitted that the COA wrongly held that the onus was upon ZZ to have rectified the register of members to show that KCHSB was its 100% owner because the register documents were with the respondents and they, being the directors of the company, should have carried out the rectification. The appellants also submitted that the effect of the COA's decision was to render the FC order, which recognised KCHSB as the 100% owner of all the shares in ZZ, ineffectual simply because the register of members had not been rectified.

Held, unanimously allowing the appeal, setting aside the decision of the COA and reinstating the High Court's decision:

(1) By granting KCHSB's prayer in its two suits against the respondents that it was the legitimate and beneficial owner of all the issued shares in ZZ, the High Court effectively restored KCHSB as the 100% owner of ZZ, backdated to 3 June 2003, and that decision was upheld by both the Court of Appeal and the Federal Court (see paras 9–12).

(2) Having regard to the terms of s 144(1) of the CA, KCHSB as the sole owner of ZZ and therefore a member holding 'not less than one-tenth of

the paid-up capital' of ZZ, was clearly vested with the authority to requisition for the EGM of ZZ through its corporate representative, PW1 (see para 30).

(3) The FC order favoured ZZ and was adverse to the respondents. It was therefore imperative for the respondents, as the losing party, to have obeyed the FC order which included, most importantly, the order to rectify the register of members of ZZ pursuant to s 162 of the CA. The respondents were the directors of ZZ having full control of the company and it was within their power to rectify the register. Given the full effect of the FC order, the list of members as was reflected in ZZ's register was not conclusive evidence of the ownership of the company (see paras 61–62 & 84).

(4) The respondents openly defied the FC order which led to a situation where, despite the decision of the High Court being finally affirmed by the FC, the decision was not obeyed the respondents. The respondents failed to undo the wrong they had perpetrated on ZZ which they could easily have done by rectifying the register of members of ZZ to the position it was in before they fraudulently transferred ZZ's shares to themselves in 2003 (see paras 63–64).

(5) The effect of what the respondents did, or rather did not do, was to defeat the FC order and wipe out the fruits of ZZ's litigation in the High Court as affirmed by the Court of Appeal and the Federal Court. To accede to the respondents' argument that it was ZZ's duty to rectify the register would mean that despite winning at every stage of the case, ZZ would end up the loser because the respondents, for reasons best known to them, refused to rectify the register of members to give effect to the High Court's orders. The fact that the relevant documents were with the Malaysian Anti-Corruption Commission ('MACC'), even if true, was a lame excuse for not making any attempt to rectify the register because the documents were only seized by MACC from ZZ in May 2015, well after the FC order was delivered in October 2013. The respondents had more than sufficient time to comply with the FC order if they had wanted to (see paras 65–67).

(6) Where a holding company owned 100% of its subsidiary and was therefore its sole corporate member, its corporate representative was entitled in law to requisition for an EGM of the subsidiary. And any resolution passed at such EGM would be valid by reason of ss 152(A) and 147(6) of the CA. To accede to the construction given by the respondents to s 147(3) of the CA would result in a situation where a holding company like KCHSB would find itself powerless over its subsidiary despite being its sole owner (see paras 83–84).

[Bahasa Malaysia summary

Pada setiap masa material, responden merupakan pengarah perayu ('ZZ') satu anak syarikat dimilik penuh oleh satu syarikat lain ('KCHSB'). Satu masa selepas 3 Jun 2003, pindahan saham melibatkan penipuan menyebabkan pegangan saham ZZ untuk jatuh ke tangan responden. Selepas mendapati penipuan tersebut, KCHSB menyaman responden di Mahkamah Tinggi untuk mendapatkan semula milikan penuh mereka terhadap ZZ. Mahkamah Tinggi memutuskan bahawa KCHSB merupakan pemilih sah dan benefisial semua saham yang dikeluarkan dalam ZZ dan memerintahkan daftar ahli ZZ untuk dibetulkan untuk menunjukan kedudukan tersebut selaras dengan s 162 Akta Syarikat 1965 ('AS'). Keputusan Mahkamah Tinggi telah dikekalkan sewaktu rayuan di Mahkamah Rayuan ('MR') dan Mahkamah Persekutuan ('MP'). Dalam mengekalkan keputusan Mahkamah Tinggi, MP telah memerintahkan ('perintah MP') bahawa: (a) pegangan saham ZZ dipulih hak kepada kedudukannya pada 3 Jun 2003, iaitu, sebelum pindahan saham melibatkan penipuan tersebut berlaku; (b) semua pindahan dan peruntukan saham dalam modal pada atau sebelum 3 Jun 2003 dibatalkan dan tiada apa-apa kesan; dan (c) daftar ahli ZZ dibetulkan selaras dengan s 162 AS untuk mencerminkan perintah MP. Namun responden, tidak mengambil apa-apa langkah untuk membetulkan daftar ZZ selaras dengan perintah MP. Selepas perintah MP diberikan, KCHSB, selaras dengan s 147(3) AS, meluluskan satu resolusi pengarah yand diedarkan melantik wakil korporatnya PW1 untuk hadir dan mengundi di semua mesyuarat agung ZZ dan untuk melaksanakan kuasa yang sedemikian yang KCHSB mempunyai kuasa untuk melaksanakannya sekiranya ianya seorang individu. PW1 mengeluaran satu notis untuk memanggil satu mesyuarat agung luar biasa ('EGM') ZZ untuk meluluskan satu resolusi untuk, antaranya, mengeluarkan semua responden sebagai pengarah ZZ dan melantik PW1 dan dua yang lain (yang mana kesemuanya merupakan pengarah KCHSB) sebagai pengarah baru ZZ dan untuk melantik PW1 sebagai pengarah pengurus dan pentadbir ZZ. Selepas Mahkamah Tinggi mengisytiharkan resolusi yang diluluskan di EGM tersebut tidak sah atas sebab satu ketidakpatuhan teknikal, PW1 mengeluarkan satu notis rekuisisi baru kepada lembaga pengarah ZZ untuk EGM kedua. Menurut respondent pertama, EGM kedua dibatalkan kerana tidak mempunyai koram yang mencukupi. Namun, PW1 menyatakan bahawa dia telah mempengerusikan dan meneruskan dengan EGM tersebut dan majoriti pemegang saham membuat resolusi untuk, antara yang lain, mengeluarkan responden sebagai pengarah ZZ. Untuk menguatkuasakan resolusi yang diluluskan di EGM tersebut, ZZ memohon ke Mahkamah Tinggi untuk pelbagai perintah terhadap responden. Mahkamah Tinggi membenarkan perintah yang dipohon dan memutuskan bahawa PW1 berhak untuk membuat rekuisisi untuk EGM kerana KCHSB, yang mana diwakili beliau, memiliki ZZ sepenuhnya. Mahkamah juga memutuskan bahawa resolusi yang diluluskan di EGM adalah sah selaras dengan ss 152(A) dan 147(6) AS. Dalam

mengenepikan keputusan itu, MR memutuskan bahawa untuk KCHSB memanggil secara sah EGM tersebut melalui PW1, ianya harus ditunjukan bahawa KCHSB memiliki ZZ secara penuh dan fakta ini tidak dibuktikan oleh ZZ terutamanya atas sebab daftar ahlinya tidak mencerminkan kedudukan tersebut (perintah MP tidak secara lisan menyatakan bahawa KCHSB merupakan pemilik ZZ 100% tapi hanya bahawa pegangan saham ZZ dipulihkan kepada kedudukanya seperti pada 3 Jun 2003). MR juga memutuskan bahawa kuasa PW1 sebagai wakil korporat KCHSB hanya untuk hadir dan mengundi bagi pihaknya di mana-mana mesyuarat syarikat yang mana KCHSB merupakan seorang ahli dan tidak termasuk kuasa untuk merekuisisi satu EGM. MR selanjutnya mendapati bahawa semua resolusi yang diluluskan di EGM kedua adalah tidak sah dan tidak boleh dikuatkuasakan terhadap responden. Dalam rayuan ini terhadap keputusan tersebut, perayu menghujahkan bahawa MR telah secara salah memutuskan bahawa beban adalah pada ZZ untuk membetulkan dafar ahli untuk menunjukan KCHSB merupakan pemilik 100% kerana daftar dokumen berada dengan responden, dan mereka, sebagai pengarah syarikat , sepatutnya menjalankan pembetulan tersebut. Perayu juga menghujahkan bahawa kesan keputusan MR adalah untuk membolehkan perintah MP, yang mengiktiraf KCHSB sebagai pemilik 100% semua saham dalam ZZ, tidak berkesan hanya kerana daftar ahli tidak dibetulkan.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan keputusan MR dan mengekalkan keputusan Mahkamah Tinggi:

(1) Dengan membenarkan permohonan KCHSB dalam dua guamannya terhadap responden yang mana ianya merupakan pemilih sah dan benefisial semua saham yang dikeluarkan dalam ZZ, Mahkamah Tinggi telah memulihkan KCHSB sebagai pemilik 100% ZZ yang dikebelakangkan ke 3 Jun 2003, dan keputusan itu telah dikekalkan oleh Mahkamah Rayuan dan Mahkamah Persekutuan (lihat perenggan 9–12).

(2) Berkaitan dengan terma s 144(1) AS, KCHSB sebagai pemilik tunggal ZZ dan oleh demikian merupakan seorang ahli yang memegang tidak kurang daripada satu persepuluh modal berbayar ZZ, adalah jelas mempunyai kuasa untuk merekuisisi EGM ZZ melalui wakil korporatnya, PW1 (lihat perenggan 30).

(3) Perintah MP memihak kepada ZZ dan adalah tidak memihak kepada responden. Oleh yang demikian ianya adalah penting untuk responden, sebagai pihak yang tewas, untuk mematuhi perintah MP yang termasuk, dan adalah penting, perintah untuk membetulkan daftar ahli ZZ selaras dengan s 162 AS. Responden merupakan pengarah ZZ yang mempunyai kawalan penuh syarikat dan ianya adalah dalam kuasa mereka untuk membetulkan daftar tersebut. Mengambil kira kesan penuh perintah MP,

senarai ahli adalah seperti yang dicerminkan didalam daftar ZZ bukanlah keterangan konklusif berkaitan dengan pemilikan syarikat (lihat perenggan 61–62 & 84).

(4) Responden dengan nyata ingkar perintah MP yang membawa kepada keadaan di mana, walaupun keputusan Mahkamah Tinggi telah disahkan oleh MP, keputusan tersebut tidak dipatuhi oleh responden. Responden gagal untuk membetulkan kesilapan yang mereka lakukan terhadap ZZ yang boleh dibuat dengan mudah dengan membetulkan daftar ahli ZZ kepada kedudukan dimana ianya sebelum mereka secara tipu memindahkan saham ZZ kepada diri mereka pada tahun 2003 (lihat perenggan 63–64).

(5) Kesan apa yang dilakukan oleh responden, ataupun tidak lakukan, adalah untuk menewaskan perintah MP dan membatalkan hasil litigasi ZZ di Mahkamah Tinggi seperti yang disahkan Mahkamah Rayuan dan Mahkamah Persekutuan. Untuk menerima hujahan responden, bahawa ianya merupakan tanggungjawab ZZ untuk membetulkan daftar akan membawa maksud walaupun telah menang di semua peringkat kes, ZZ akan tewas kerana responden, untuk sebab hanya lebih diketahui oleh mereka, enggan untuk membetulkan daftar ahli untuk memberi kesan kepada perintah Mahkamah Tinggi. Fakta bahawa dokumen berkaitan berada dengan Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM'), jikalaupun benar, merupakan satu alasan yang lemah untuk tidak membuat apa-apa usaha untuk membetulkan daftar kerana dokumen dirampas oleh SPRM pada bulan Mei 2015, iaitu lama selepas perintah MP diberikan pada Oktober 2013. Responden mempunyai masa yang mencukupi untuk mematuhi perintah MP sekiranya mereka ingin berbuat sedemikian (lihat perenggan 65–67).

(6) Apabila satu syarikat pemegangan memiliki 100% anak syarikatnya dan oleh yang demikian merupakan ahli korporat tunggalnya, wakil korporatnya berhak disisi undang-undang untuk merekuisisikan satu EGM untuk anak syarikatnya. Dan apa-apa resolusi yang diluluskan di EGM tersebut adalah sah atas sebab ss 152(A) dan 147(6) AS. Untuk bersetuju dengan tafsiran yang diberikan oleh responden kepada s 147(3) AS akan menyebabkan dalam keadaan di mana satu syarikat pemegangan seperti KCHSB tidak mempunyai apa-apa kuasa terhadap anak syarikatnya walaupun merupakan pemilik tunggalnya (lihat perenggan 83–84).]

Cases referred to

Chia Yan Tek & Anor v Ng Swee Kiat & Anor [2001] 4 MLJ 1; [2001] 4 CLJ 61, FC (refd)

Drico Ltd v Drico (Water Specialist) Sdn Bhd (Company No 112278-M), Ismail bin Johari, Kinoshita Masao, Tam Kok Meng [2011] MLJU 439, HC (distd)

Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd [2018] 4 MLJ 773; [2018] 10 CLJ 517, CA (refd)
Low Thiam Hoe & Anor v Sri Serdang Sdn Bhd & Ors [2020] 10 MLJ 137, HC (refd)
Owen Sim Liang Khui v Piasau Jaya [1996] 1 MLJ 113; [1996] 4 CLJ 716, FC (refd)
Roxy Electric Industries (Malaysia) Bhd v Syarikat Nominee Bumiputra Sdn Bhd & Ors [1989] 3 MLJ 231, HC (refd)

Legislation referred to

Companies Act 1965 ss 144(1), 144(3), 147, 147(3), 147(6), 152(A), 152A(1), 162
Evidence Act 1950 ss 101(1), 102, 103
Rules of the Federal Court 1995 r 63

Appeal from: Civil Appeal No S-02(NCVC)(W)-1989–10 of 2016 (Court of Appeal, Kota Kinabalu)

Norbert Yapp (Norbert Yapp & Assoc) for the appellant.
Chung Jiun Dau (Chung & Assoc) for the respondents.

Abdul Rahman Sebli FCJ (delivering jdugment of the court)

[1] This appeal emanates from the decision of the Court of Appeal reversing the decision of the High Court allowing the appellant's claim. The decision of the Court of Appeal has since been reported in *Kwan Hung Cheong & Anor v Zung Zang Trading Sdn Bhd* [2018] 4 MLJ 773; [2018] 10 CLJ 517.

[2] The appellant Zung Zang Trading Sdn Bhd (formerly known as 'Zung Zang Wood Products Sdn Bhd') ('Zung Zang') filed a writ action in the High Court against the respondents to enforce a shareholders' resolutions passed at its extraordinary general meeting ('EGM') held on 26 July 2014.

[3] Essentially the reliefs sought by Zung Zang against the respondents in the writ action were, inter alia, as follows:

(i) an order that the first and second respondents do within four days of the date of service of the order on them deliver or cause to be delivered up to the appellant the register book, minute book, common seal, secretarial files, all the accounting and other statutory records, bank statements, bank-in slips, cheque butts, books, files and agreements of the appellant as may be within the custody, control and/or possession of the respondents and/or their agents and servants;

(ii) an order that the first and second respondents do within four days of the date of service of the order hand over and surrender to the appellant the

possession, custody and control of all moveable properties of the appellant including the trading goods, building materials, stocks in trade and vehicles;

(iii) the first and second respondents whether by themselves or their servants or agents or otherwise howsoever be restrained from trespassing on the business premises of the appellant at Mile 3 1/2, North Road, Sandakan (TL 077550737) or interfering with and/or meddling in the business operations and affairs of the appellant or holding themselves out as director or officer of the appellant;

(iv) an account of all monies received by the first and second respondents in their former capacity as the directors of the appellant; and

(v) an order for the payment by the first and second respondents to the appellant of all sums found to be due from them to the appellant on the taking of the account under (iv) above.

[4] There were three leave questions for our determination in connection with the decision of the Court of Appeal to reverse the decision of the High Court, and they are:

(1) whether the list of members as reflected in the company's register is conclusive evidence of ownership given the full effect of the Federal Court order dated 7 October 2013;

(2) whether a corporate representative of a holding company of a wholly owned subsidiary is entitled in law to requisition an extraordinary general meeting ('EGM') of the subsidiary; and

(3) whether any resolution passed at such EGM would nonetheless be valid by reason of ss 152(A) and 147(6) of the Companies Act 1965 ('the Companies Act').

[5] Leave question (1) was an additional question framed by the panel of this court hearing the leave application. It arose from the Court of Appeal's finding that there is no evidence that Zung Zang is 100% owned by Kwan Chee Hang Sdn Bhd ('KCHSB'). According to the Court of Appeal, it was only an assumption by the learned trial judge that Zung Zang is 100% owned by KCHSB.

[6] Learned counsel for the respondents submitted that the additional question (1) is not relevant based on the facts and issue of this case as a copy of the register of members of Zung Zang was never produced as evidence by Zung Zang. Therefore, whether the information contained in the register of members is conclusive or not cannot be relevant when that information is not even before the court.

[7] The case has a chequered history that goes back to 2010. The salient facts are as follows. The appellant Zung Zang is a private limited company incorporated in Malaysia on 25 April 1994 under the Companies Act with an authorised share capital of RM100,000 divided into 100,000 shares of RM1 each.

[8] Zung Zang was at all material times a wholly owned subsidiary of KCHSB before KCHSB was fraudulently removed as its 100% owner in 2003 by the respondents.

[9] On discovering the fraud, KCHSB filed two separate suits against the respondents in the High Court at Sandakan, Sabah to regain full ownership of Zung Zang and its subsidiaries. Among the reliefs sought by KCHSB in the two suits were:

(i) a declaration that KCHSB is the legitimate and beneficial shareholders of all the issued shares of Zung Zang; and

(ii) an order that the register of members of Zung Zang be rectified pursuant to s 162 of the Companies Act.

[10] Following a full trial of the action, the High Court at Sandakan on 30 November 2010 allowed Zung Zang's claim, including to grant, in particular, the two prayers above. Thus, by declaring in terms of prayer (i) that KCHSB is the legitimate and beneficial shareholders of 'all' the issued shares of Zung Zang, the High Court had effectively restored KCHSB as the 100% owner of Zung Zang.

[11] The restoration of KCHSB as the 100% owner of Zung Zang by the Sandakan High Court on 30 November 2010 was unanimously affirmed by the Court of Appeal on 29 March 2012 and later by the unanimous decision of a five member panel of this court on 7 October 2013.

[12] Therefore, by 30 November 2010 (the date the Sandakan High Court made the order), full ownership of Zung Zang had reverted to KCHSB, backdated to 3 June 2003. We reproduce below paras (2), (3), (4), (5) and (6) of this court's order dated 7 October 2013 which affirmed the decisions of the High Court and the Court of Appeal:

> (2) That the shareholdings of the members of Zung Zang Wood Products Sdn Bhd to be restored to the position as at 3.6.2003, that is, before the impugned transfers of the shares and that the shareholdings of the members of Zung Zang Holdings Sdn Bhd to be restored to the position as at 4.6.2003, that is, before the impugned transfer of shares;
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> (3) That all transfers and allotments of shares in the capital of Zung Zang Wood

A Products Sdn Bhd on or after 3.6.2003 and in the capital of Zung Zang Holdings Sdn Bhd on or after 4.6.2003 do stand cancelled and are of no effect;

(4) That the shareholdings of the members of Zung Zang Plantation Sdn Bhd be restored to the proportion of 80% to Zung Zang Holdings Sdn Bhd and that the shareholdings of the members of Granright Enterprise Sdn Bhd be restored to the
B proportion of 85% to Zung Zang Holdings Sdn Bhd;

(5) That the register of members of Zung Zang Wood Products Sdn Bhd, Zung Zang Holdings Sdn Bhd, Zung Zang Plantation Sdn Bhd and Granright Enterprise Sdn Bhd be rectified pursuant to section 162 of the Companies Act 1965 to reflect
C the above orders; and

(6) That in relation to the register of members of Zung Zang Wood Products Sdn Bhd, Zung Zang Holdings Sdn Bhd, Zung Zang Plantation Sdn Bhd and Granright Enterprise Sdn Bhd, a notice of rectification be lodged.

D **[13]** The respondents have not complied with this order. Instead, they allege that it is Zung Zang who has failed to comply with the order by not restoring the shares of KCHSB in Zung Zang. It would appear that the respondents are taking advantage of para (6) of the order which required the register of
E members of Zung Zang to be restored to the position before 3 June 2003, but without stating which party was to lodge the notice of rectification.

[14] We do not think the respondents are at liberty to take that position. This court's order of 7 October 2013 must not be taken in isolation. It must be
F taken together with the order of the Sandakan High Court dated 30 November 2010 which declared KCHSB to be the 100% owner of Zung Zang and a consequential order that the register of members of Zung Zang be rectified pursuant to s 162 of the Companies Act. In making the order dated 7 October 2013, this court was merely affirming the decision of the Sandakan High Court
G which the Court of Appeal had earlier affirmed.

[15] Therefore, the fact that para (6) of this court's order of 7 October 2013 does not state which party was to take the steps to rectify the register of members of Zung Zang does not mean that the order of the Sandakan High
H Court dated 30 November 2010 has ceased to have effect and can be ignored. That order has never been set aside. On the contrary, it has been affirmed by the Court of Appeal and by this court. Contempt proceedings have in fact been filed by Zung Zang against the respondents on 19 March 2015 for their failure to comply with this court's order of 7 October 2013.

I **[16]** If para (6) of this court's order has given rise to some uncertainty, real or imagined, there is no ambiguity in para (2) of the order. It states in unequivocal terms that the shareholdings of the members of Zung Zang was 'to be restored to the position as at 3 June 2003', which was the position before the

respondents fraudulently transferred Zung Zang's shares to themselves in 2003.

[17] This is fortified by para (3) of the order which states that the (fraudulent) transfers and allotments of shares (by the respondents to themselves) on or after 3 June 2003 'do stand cancelled and are of no effect'. In other words, with effect from 3 June 2003, KCHSB had regained full (100%) control of Zung Zang from the respondents.

[18] It needs to emphasised, at the risk of being repetitive, that the position of the shareholdings of the members of Zung Zang after the Sandakan High Court delivered its decision on 30 November 2010 is that KCHSB is now the 100% owner of Zung Zang, meaning to say Zung Zang is wholly owned by KCHSB.

[19] It is crucially important to bear this in mind because in reversing the decision of the High Court, the Court of Appeal's finding was that Zung Zang failed to prove that it is 100% owned by KCHSB. It is undoubtedly a factor that weighed heavily in the mind of the Court of Appeal in setting aside the decision of the High Court. We shall say more on this point later in this judgment.

[20] On 22 October 2013, which was approximately two weeks after this court delivered its decision on 7 October 2013, the corporate representative of KCHSB in the person of Kwan Hiuang @ Kwan Huang Cheng ('PW1') issued a notice calling for an extraordinary general meeting ('EGM') of Zung Zang and fixing the EGM to be held on 30 November 2013. His appointment as the corporate representative of KCHSB was by way of a directors circular resolutions dated 16 October 2013, which was in the following terms:

> That Mr Kwan Hiuang @ Kwan Huang Cheng (NRIC No 571230–12–5269) of Lot 8, Lorong Sentosa 8, Taman Sentosa, 90000 Sandakan Sabah be and are hereby appointed as the Company's Corporate Representative pursuant to Section 147(3) of the Companies Act 1965 to attend and consent to short notice (if necessary) and to vote at all General Meetings of ZUNG ZANG TRADING SDN BHD (Company No 297320-R) ('Corporation') and at any adjournment thereof and without prejudice to the generality of the foregoing, to exercise the same powers on behalf of the Company as the Company can exercise as if it was an individual member of the Corporation.
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> That approval be hereby given for the Company Seal of the Company to be affixed onto the Notification and Certificate of Appointment of Corporate Representative(s) in accordance with the Articles of Association of the Company.

[21] Since KCHSB owns 100% of the shares of Zung Zang, PW1 as the corporate representative of KCHSB proceeded to hold the EGM ('the first

EGM') of Zung Zang in the absence of the board of directors ('the BOD') of Zung Zang which comprised the first and second respondents, and passed the proposed resolutions.

[22] However, the respondents subsequently applied to the High Court to declare the requisition dated 21 October 2013 invalid on the ground that the notice of the first EGM dated 22 October 2013 was issued prematurely by PW1 in breach of s 144(3) of the Companies Act. The High Court agreed with the respondents and nullified the resolutions passed at the first EGM.

[23] It will thus be seen that the resolutions were declared invalid not because PW1 had not been properly appointed as KCHSB's corporate representative but because there was a breach of s 144(3) of the Companies Act, which stipulates as follows:

> (3) If the directors do not within twenty-one days after the date of the deposit of the requisition proceed to convene a meeting the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves, in the same manner as nearly as possible as that in which meetings were to be convened shall not be held after the expiration of three months from that date.

[24] This necessarily means that PW1's appointment as the corporate representative of KCHSB on 16 October 2013 remained valid except that the resolutions passed on 30 November 2013 were null and void. Thereafter, on 26 May 2014, PW1 issued a fresh requisition notice to the BOD of Zung Zang to convene an EGM to consider and if thought fit, to pass, inter alia, the following ordinary resolutions:

(a) *Change of registered office*:

> That the registered office of the Company be and is hereby changed from Block G, 1st Floor, Mile 4, Bandar Kim Fung, 90000 Sandakan, Sabah to Ground Floor, Lot 23, BDC 4, Jalan BDC, Batu 1 1/2, Jalan Utara, 90000 Sandakan, Sabah.

(b) *Removal of directors*:

> That pursuant to Article 69 of the Company's Articles of Association, Mr Kwan Hung Cheong and Ms Elaine Gay Chow Song be and are hereby removed from their office of Directors of the Company with immediate effect.

(c) *Appointment of directors*:

> That the following persons have given their consent to act, be appointed as Directors of the Company with effect from the date of completion of the Statutory Declaration in compliance with Section 123(4) of the Companies Act, 1965.

(iv) Kwan Pui Ha (f) (NRIC 590411–12–5100)

(v) Wong Nyuk Ching (f) (NRIC 391026–12–5006)

(vi) Kwan Hiuang @ Kwan Huang Cheng (NRIC 571230–12–5263)

(d) *Appointment of governing director and managing director*:

That Mr Kwan Hiuang @ Kwan Huang Cheng be and is hereby appointed as Governing Director of the Company with immediate effect.

(e) *Appointment of corporate representative*:

That Mr Kwan Hiuang @ Kwan Huang Cheng be and is hereby appointed as the Company's Corporate Representative pursuant to Section 147(3) of the Companies Act, 1965 to attend and consent to short notice (if necessary), and to vote at all General Meetings of Zung Zang Holdings Sdn Bhd (Company No 442629-T) ('Corporation') and at adjournment thereof and, without prejudice to the generality of the foregoing, to exercise the same powers on behalf of the Company as the Company could exercise *as if it was an individual member of the Corporation*.

[25] Upon receipt of the requisition notice, the first respondent as a director of Zung Zang proceeded to issue the notice of EGM dated 13 June 2014 fixing the EGM to be held on 26 July 2014. This EGM ('the second EGM') is the subject matter of the present appeal.

[26] According to the first respondent, on the date the second EGM was supposed to take place, there was insufficient quorum and the EGM was not validly requisitioned and because of that he claimed he had no choice but to announce that the EGM was aborted. He walked out of the meeting but PW1 proceeded to chair the EGM and the majority shareholders of Zung Zang resolved, inter alia, to remove the first and second respondents as directors of the Zung Zang with immediate effect.

[27] This is the pivotal issue in this appeal — whether the resolutions passed by Zung Zang at the second EGM were valid and enforceable against the respondents. The answer to this question depends on whether PW1 as a corporate representative of KCHSB (which owns 100% of Zung Zang) was vested with the authority to requisition the second EGM of Zung Zang on behalf of KCHSB. The respondents' case was that the requisition was invalid as KCHSB was not a member of Zung Zang and therefore PW1 as a corporate representative of KCHSB had no power or authority to requisition for any EGM of Zung Zang.

[28] The respondents were of course referring to s 144(1) of the Companies Act, which provides:

> 144 (1) The directors of a company, notwithstanding anything to the contrary, shall *on the requisition of members holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital as at the date of the deposit* carries the right of voting at general meetings or, in the case of a company not having a share capital, of members representing not less than one-tenth of the total voting rights of all members having at that date a right to vote at general meetings, forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the company of the requisition. (Emphasis added.)

[29] In *Roxy Electric Industries (Malaysia) Bhd v Syarikat Nominee Bumiputra Sdn Bhd & Ors* [1989] 3 MLJ 231, Zakaria Yatim J (as he then was) said at p 233:

> The next question to consider is whether the requisitionists were entitled to issue the requisition and the special notice under s 14. Under sub-s (1) members may requisition for an EGM if they are holding, at the date of the deposit of the requisition not less than one-tenth of the paid up capital as at the date of the deposit. The word 'members' in sub-s (1) has been defined in s 16(6) of the Companies Act, which states:
>
> > The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.
>
> Under art 12 of the articles of association of Roxy, every person whose name is entered as a member in the register of members is entitled to receive a share certificate. Therefore, a member of a company is a person whose name is on the register of shareholders. The register is the only evidence by which the rights of members to vote at a general meeting can be ascertained: *Pender v Lushington* [1877] 6 Ch D 70.

[30] We shall at the outset state our view on this point. Having regard to the terms of s 144(1) of the Companies Act, KCHSB being the sole and only owner of Zung Zang and therefore its member holding 'not less than one-tenth of the paid up capital' of Zung Zang, it is clear that KCHSB through PW1 as its corporate representative was vested with the authority to requisition the second EGM of Zung Zang.

[31] Zung Zang's contention was that the first respondent's act of leaving the meeting was to frustrate the second EGM and not because of lack of quorum or that the requisition was invalid. At the trial, PW1's testimony was that he was personally present at the second EGM as the corporate representative of KCHSB and that he chaired the EGM. The other attendees were the first

respondent, Madam Wong Nyuk Ching, Mr Lam Chung Fatt and Mr Chung Tet Kan (as an alternative director).

[32] It was Zung Zang's case that PW1, being the corporate representative of KCHSB which owns 100% of Zung Zang, had lawfully passed the proposed resolutions, including the resolution to remove the first and second respondents as directors of Zung Zang with immediate effect and to appoint PW1 as the governing director.

[33] It was further submitted that since the corporate representative of KCHSB represented 100% of the shares of Zung Zang, by virtue of ss 152A(1) and 147(6) of the Companies Act, the minutes signed by PW1 would satisfy the requirement of the resolutions having been duly passed at the second EGM. Sections 152A(1) and 147(6) of the Companies Act provide as follows:

> Section 152A(1)
>
> Notwithstanding anything to the contrary in this Act or the Articles of the Company, a resolution in writing signed by or on behalf of all persons for the time being entitled to receive the notice of, and to attend and vote at the general meetings of the company shall, for the purpose of this Act and the Articles of the company, be treated as a resolution duly passed at a general meeting of the company and, where relevant, as a special resolution so passed.
>
> Section 147(6)
>
> Where a *holding company is beneficially entitled to the whole of the issued shares of a subsidiary* and a minute is signed by a representative of the holding company authorised pursuant to subsection (3) stating that any act, matter, or thing, or any ordinary or special resolution, required by this Act or by the memorandum or articles of the subsidiary to be made, performed, or passed by or at an ordinary general meeting or an extraordinary general meeting of the subsidiary has been made, performed, or passed, that act, matter, thing, or resolution shall, for all purposes, be deemed to have been duly made, performed, or passed by or at an ordinary general meeting, or as the case requires, by or at an extraordinary general meeting of the subsidiary. (Emphasis added.)

[34] On 23 September 2016, the High Court delivered its decision, allowing Zung Zang's claim against the respondents with costs of RM25,000. In deciding in favour of Zung Zang, the learned trial judge ruled that PW1 as the corporate representative of KCHSB was entitled to requisition the second EGM, given that Zung Zang is a wholly owned subsidiary of KCHSB and that the resolutions were properly passed by virtue of ss 152(A)(1) and 147(6) of the Companies Act.

[35] The learned trial judge rejected the first respondent's claim that he had called off the second EGM due to lack of quorum and that the EGM was not

validly requisitioned by PW1 as the corporate representative of KCHSB. Learned counsel for Zung Zang submitted that this was a correct finding as the first respondent had no power to call off the second EGM as the proper and rightful person to chair the second EGM was the shareholder and not the director of Zung Zang for the reason that this was a members' meeting and not a directors' meeting.

[36] It was pointed out that the first respondent as a director of Zung Zang was not a shareholder of Zung Zang as the shares were 100% owned by KCHSB and that the function of the BOD, which comprised the two respondents, was only to facilitate the second EGM. It was emphasised that in any event KCHSB has been restored as 100% owner of Zung Zang, as affirmed by this court on 7 October 2013.

[37] It is relevant to note in this regard that in the writ action filed by Zung Zang, the respondents counterclaimed against Zung Zang for a declaration that the second EGM was invalid and ineffective. However, the respondents withdrew the counterclaim at the commencement of the trial on 14 January 2016 and they did not at any time apply to set aside the minutes of the second EGM.

[38] What this means, according to learned counsel for Zung Zang is that the respondents were not challenging the validity of the minutes, and that in the circumstances the respondents are now estopped from doing so. Mr Chung Jiun Dau for the respondents disputed this by saying that the respondents never accepted the minutes as no certificate issued under s 147 of the Companies Act was ever given to Zung Zang.

[39] Mr Norbert Yapp's answer to the contention was that it is not a requirement of s 147 of the Companies Act that the certificate must be produced at the EGM. It was argued that when PW1 issued the requisition holding himself as a corporate representative of KCHSB holding 100% share of Zung Zang, the respondents did not dispute it. Therefore there was no need for Zung Zang to prove that PW1 was the corporate representative of KCHSB.

[40] It was also pointed out that when the first respondent ('DW1') was cross-examined at the trial, he admitted that the three persons who signed the resolutions, namely Kwan Phui Ha, Wong Nyuk Ching and PW1 were the only directors of KCHSB at the material time.

[41] Being dissatisfied with the decision of the High Court, the respondents appealed to the Court of Appeal. The issues that arose for the Court of Appeal's adjudication were:

(a) whether KCHSB had the right to issue the requisition to Zung Zang for the second EGM to be held; and

(b) whether Zung Zang's EGM, and the resolutions passed, were valid in law, entitling Zung Zang to the reliefs applied for in the High Court.

[42] On 17 November 2017, the Court of Appeal by a unanimous decision allowed the respondents' appeal and set aside the decision of the High Court dated 23 September 2016, on the following grounds:

(a) since the suit was premised on KCHSB being the 100% owner of Zung Zang, the burden was on Zung Zang to prove that KCHSB is the sole shareholder and owner of Zung Zang. However, the order of this court dated 7 October 2013 did not state explicitly that KCHSB is the 100% owner of Zung Zang;

(b) based on this court's order of 7 October 2013, KCHSB owned 100% of the shares in Zung Zang, *provided* the shareholdings of the members of the Zung Zang were restored. But the shares of KCHSB in Zung Zang has not been restored yet. Therefore, there was no evidence for the High Court to come to the conclusion that KCHSB was the 100% owner of Zung Zang to entitle KCHSB to issue the requisition to the BOD of Zung Zang to call for the second EGM;

(c) s 147(3) of the Companies Act only refers to a corporate representative acting at a particular meeting or at all meetings of the company. The provision does not refer to issuing notices or doing things outside of the meeting or meetings of the company.

Section 147(3) makes it clear that the corporate representative's exercise of powers on behalf of the company 'shall' be 'in accordance with' the authority given. PW1 was appointed as the corporate representative of KCHSB via a resolution. PW1 was only appointed 'to attend and vote' on behalf of KCHSB at any meeting of a company in which KCHSB is a member. There was no mention of PW1 being given the authority to issue notices or exercise other powers on behalf of KCHSB. PW1 was therefore not authorised to issue any requisition on behalf of KCHSB to Zung Zang to call for an EGM. The requisition for the EGM was therefore invalid; and

(d) the reliefs sought by the appellant presupposed that the respondents were keeping the documents or things in their custody or control in their personal capacities, as opposed to their capacities as directors of the appellant.

There was evidence that most of the documents and items sought for were taken into the custody and control of the Malaysian

A Anti-Corruption Commission. Without having proved its claim, there was no basis for the High Court to grant the appellant the reliefs prayed for.

B **[43]** The penultimate conclusion that the Court of Appeal arrived at after finding that KCHSB failed to prove 100% ownership of Zung Zang was that 'Consequently, all the resolutions passed at the EGM are not valid and hence not enforceable against the Respondents'. It is clear that the tipping point that led to the Court of Appeal's conclusion was KCHSB's alleged failure to prove that it owns 100% of Zung Zang.

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[44] Based on this conclusion, learned counsel for the respondents contended that there was no basis for PW1 to continue claiming that he is a director of Zung Zang or authorised to represent Zung Zang. It was pointed out that PW1 did not intervene in the proceedings in order to appeal against this finding by the Court of Appeal.

D

[45] It was further pointed out by Mr Chung Jiun Dau in his submissions that a winding up order had been entered against KCHSB on 14 January 2019 and the official receiver had been appointed as the interim liquidator. It was PW1 who instructed the filing of the notice of appeal dated 4 July 2019. This means, according to counsel, the filing of the notice of appeal was neither instructed nor authorised by any director or officer of Zung Zang and that PW1 cannot claim to be representing KCHSB in filing the notice of appeal. Hence the appeal should be dismissed.

E

F

[46] Mr Norbert Yapp's answer to the argument was that the locus of KCHSB does not arise as the minutes of the second EGM were good enough to cloak PW1 with the authority to authorise him (Mr Norbert Yapp) to act on behalf of Zung Zang.

G

[47] It was the contention of learned counsel for the respondents that before this court answers the leave questions, the following factual and legal questions which the Court of Appeal based its decision on need to be dealt with first (for posterity we include counsel's submissions immediately following each of the questions raised):

H

(a) did the EGM of Zung Zang proceed on 26 July 2014?

I

Submission: No, because PW1 himself in his testimony said the meeting did not proceed as there was not enough quorum. In the minutes, there is no mention of any attempt by the 1st respondent to put his own agenda as alleged by PW1. The minutes suggest that the 1st respondent did not say anything other than the meeting being invalid. This shows the minutes are fictitious and contradicted by PW1's own evidence.

(b) is KCHSB a 100% shareholder of Zung Zang?

Submission: No such evidence. Since it was PW1 who wanted the court to believe that KCHSB is 100% owner of Zung Zang, the burden was on him to prove that fact but PW1 adduced no evidence to prove that fact save for his reliance on this court's order dated 7.10.2013 to the effect that 'the shareholdings of the members of Zung Zang Wood Products Sdn Bhd to be restored to the position as at 3.6.2003'.

In the order of 7.10.2013, this court did not explicitly state that KCHSB is the 100% owner of Zung Zang. There was no declaration that KCHSB is the 100% owner of Zung Zang. This means that if PW1 failed to adduce any evidence to show that KCHSB is the 100% owner of Zung Zang, the action would fail, citing sections 101(1), 102, and 103 of the Evidence Act 1950.

(c) was PW1 properly appointed as a corporate representative of KCHSB and/or was Zung Zang properly notified of such appointment?

Submission: PW1 was not properly appointed. PW1 did not refer to the certificate of appointment issued under section 147(5) of the Companies Act. No such certificate given by KCHSB was given before or during the EGM: *Drico Ltd v Drico (Water Specialist) Sdn Bhd (Company No 112278-m), Ismail bin Johari, Kinoshita Masao, Tam Kok Meng* [2011] MLJU 439. In other words, PW1's purported appointment as corporate representative of KCHSB for the purposes of meetings of Zung Zang was not in compliance with the necessary procedure.

(d) can a corporate representative make a requisition?

Submission: No, because the directors' circular resolution of KCHSB dated 2.12.2010, even if valid, merely appointed a corporate representative to attend and vote on behalf of KCHSB at any meeting of a company in which KCHSB is a member. There is no mention of the corporate representative being able to issue notices or other such powers or authorization on behalf of KCHSB. Notices including requisitions are not something done while attending a meeting.

Leave question 2 is premised on certain factual circumstances, namely that the holding company holds 100% of the shares in the subsidiary. The presumed facts do not apply in the present case or have not been proved at the trial.

Further, the right to issue a requisition or to vote at a general meeting of a company is to be based on the register of members: *Roxy Electric Industries (Malaysia) Bhd v Syarikat Nominee Bumiputra Sdn Bhd & Ors* [1989] 3 MLJ 231; *Pender v Lushington* (1877) 6 Ch D 70.

All along the stance of PW1 and KCHSB was that KCHSB had not been restored to the register of members of Zung Zang.

(e) are the circular resolutions appointing PW1 as corporate representative valid?

Submission: No, because the circular dated 2.12.2010 is invalid as not all the directors in Malaysia had signed it. This is contrary to KCHSB's Articles of Association which reads: 'A resolution in writing signed by *all the directors* shall be valid and effectual as if it has been passed at a meeting of the directors duly called and constituted'. Hence the appointment of PW1 as corporate representative of KCHSB was also invalid as it depended on the circular resolution.

[48] Basically the arguments were to reiterate what the Court of Appeal had decided on, in particular its finding that Zung Zang has not been proved to be 100% owned by KCHSB. On his part, learned counsel for Zung Zang drew our attention to the following observations by the Court of Appeal at para 16 and para 17 of the judgment:

[16] Upon a perusal of the judgment of the Federal Court dated 7 October 2013 (AR vol 2(1) Pt C pp 359–455) in respect of the FC order, it is noted:

At p 362, that:

KCH wholly owned the 1st Appellant (Zung Zang Wood Products Sdn Bhd) (ZZ Wood) (see paragraph 9 of 121 AR read together with paragraph 7 of 141 AR); and

At p 363, that:

The corporate structure of KCH and its subsidiaries was not intricate. *KCH held the entire equity of ZZ Wood*.

(Note: 'KCH' refers to KCHSB in the present case)

17 Thus, based on the judgment of the Federal Court and the FC order *it can be accepted as evidence that as on 7 October 2013, the respondent owns 100% of the Shares in the respondent* provided that the shareholdings of the members of the respondent are restored to the position as at 3 June 2003. (Emphasis added.)

[49] According to learned counsel, this was a clear acceptance by the Court of Appeal that KCHSB has become 100% owner of Zung Zang, albeit with the qualification that the shareholdings of the members of Zung Zang are to be restored to the position as at 3 June 2003.

[50] We were also referred to para 49 of the Court of Appeal's judgment, which reads:

[49] It can be clearly seen from the respondent's minutes that PW1 attended the EGM as a corporate representative for KCHSB. It is disputed by the appellants that KCHSB is the 100% Shareholder of the respondent. However, it is not disputed by the appellants that KCHSB is a 'member' or Shareholder of the respondent. *Thus, it can be accepted that the PW1 had attended the EGM as a Shareholder's representative ie, as KCHSB's representative. Therefore, the first appellant's allegation in his letter to KCHSB and its solicitors dated 20 February 2014 that 'no Shareholder/Shareholder's representative was present at the EGM' is not true*. (Emphasis added.)

[51] It was submitted that the respondents are deemed to accept this finding as the truth as they did not cross-appeal against the finding — a finding that PW1 was a corporate representative of KCHSB at the time he requisitioned the second EGM.

[52] With regard to the respondents' allegation that Zung Zang failed to comply with this court's order to rectify the share register of members of Zung Zang, it was submitted that since the register documents were with the respondents (who were the directors of Zung Zang), it was for them and not for Zung Zang to restore the position of the shareholdings of members of Zung Zang to the position as at 3 June 2003. For this reason, it was submitted that the Court of Appeal was wrong in holding that there must be something done by Zung Zang to the register before KCHSB can claim ownership to 100% of its shares.

[53] Zung Zang's submission was that pursuant to r 63 of the Rules of the Federal Court 1995, the effective date of a judgment of this court is the date of its pronouncement, citing the decision of this court in *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 where Mohamed Dzaiddin CJ said:

> In my opinion, there is a clear distinction between the giving of judgment under s 78 of the Act and the pronouncement of the said judgment in r 63 of the Rules. Section 78 provides that the judgment or reserved judgment shall be given by the remaining judges of the court, not being less than two, and in which case, the court shall be deemed to be duly constituted. This begs the question: when is the judgment of the remaining judges given? The section does not provide the manner in which and the time from when the judgment is to take effect. Rule 63 of the Rules seems to provide the answer. Clearly, r 63 provides the mode how a judgment is to be delivered, which is, by pronouncement in open court and under para (2) of r 63, it may be read by a judge of the court or by the registrar. It seems that this was also the practice of the House of Lords where the pronouncement is made in open court in a formal way (*W'Field Fr Co v Steel Construction Co* at p 686). It must not be forgotten that the Rules have statutory force and are not mere rules of practice. See *Pacific Centre Sdn Bhd v United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143; [1984] 2 CLJ 56; [1984] 2 CLJ Rep 319.

[54] It was pointed out that the judgment of this court was pronounced in open court on 7 October 2013, ordering that the shareholdings of the members of Zung Zang be restored to the position as at 3 June 2003, ie backdated to the date prior to the fraudulent transfer of Zung Zang's shares to themselves by the respondents. In addition to that, this court had also ordered that all transfers and allotments of shares in the capital of Zung Zang on or before 3 June 2003 and the capital of Zung Zang Holdings Sdn Bhd on or after 4 June 2003 do stand 'cancelled and are of no effect'.

A **[55]** It was submitted that the effect of the decision of the Court of Appeal was to render the decision of this court dated 7 October 2013 ineffective as KCHSB is prevented from regaining full control of Zung Zang although it has been restored as the 100% owner of Zung Zang, and given that the respondents were the fraudsters who had fraudulently transferred the shares of
B Zung Zang to themselves in 2003.

[56] It was argued that the Court of Appeal ought to have given full effect to the order of this court dated 7 October 2013 even though the formal rectification of the share register pursuant to s 162 of the Companies Act had
C not been carried out yet at the material time.

[57] The point made was this. The fact that KCHSB's 100% ownership of Zung Zang has not been re-entered on the register of members of Zung Zang does not make the order of this court dated 7 October 2013 any less effective.
D What the Court of Appeal did was to go behind the decision of this court and in the process wrongly concluded that KCHSB is not the beneficial owner of the shares of Zung Zang.

E **[58]** Additionally, it was submitted that the decision of the Court of Appeal is contrary to the decision of this court in *Owen Sim Liang Khui v Piasau Jaya* [1996] 1 MLJ 113; [1996] 4 CLJ 716 where it was held, on the facts of the case, that it did not lie in the mouth of the alleged wrongdoer to say that the appellant (in that case) had no ground to stand on when the respondent, acting
F through its board, deprived the appellant of the status of a member.

[59] The view that this court took in that case was that a wrongdoer is estopped by his conduct from asserting the existence or non-existence of facts which are under his control. It was submitted that the facts of that case are
G similar to the facts of the present appeal in that the respondents were the only directors of Zung Zang.

[60] It follows, according to learned counsel for Zung Zang, that since the respondents were the only directors and thus having full control of the BOD of
H Zung Zang at the material time, it was their responsibility to carry out the rectification of the share register and not Zung Zang. In the circumstances, it was submitted that it was wrong for the Court of Appeal to hold that Zung Zang failed to prove its case against the respondents on the ground that it failed to prove that it is 100% owned by KCHSB.

I **[61]** We are inclined to agree with counsel. First of all, this court's decision of 7 October 2013 was a decision that was favourable to Zung Zang and adverse to the respondents. As we mentioned, the decision was merely to affirm the decision of the Sandakan High Court dated 30 November 2010 which

declared KCHSB to be the 100% owner of Zung Zang, and which the Court of Appeal had earlier affirmed on 29 March 2012.

[62] It is therefore imperative for the respondents as the losing party to obey the order which includes, most importantly, an order to rectify the register of members of Zung Zang pursuant to s 162 of the Companies Act. It must be remembered that the respondents, as they themselves admitted, are still the directors of Zung Zang having full control of the company. It is therefore within their power to effect the rectification.

[63] What the respondents did after this court delivered its decision on 7 October 2013 was to openly defy the order. This has led to a situation where, despite being finally affirmed by this court on 7 October 2013, the decision of the Sandakan High Court given on 30 November 2010 has yet to be complied with by the respondents.

[64] Put another way, the respondents have yet to undo the wrong that they had perpetrated on Zung Zang, which they could easily do by rectifying the register of members of Zung Zang to the position before they fraudulently transferred Zung Zang's shares to themselves in 2003.

[65] The effect of what the respondents have done, or have not done rather, is to defeat the order of this court dated 7 October 2013 and to wipe out the fruits of Zang Zang's litigation in the High Court at Sandakan as affirmed by the Court of Appeal and by this court.

[66] If we were to accede to the respondents' argument that it was Zung Zang's duty to rectify the register, it would mean that despite winning at every stage of the case, Zung Zang will end up as the losing party because the respondents, for reasons best known to themselves, are refusing to rectify the register of members of Zung Zang to give effect to the order of the Sandakan High Court dated 30 November 2010. The fact that the relevant documents are with the Anti Corruption Agency, even if true, is a lame excuse for not making any attempt to rectify the register as ordered by this court.

[67] In any case, the evidence shows that the documents pertaining to this case were seized from Zung Zang by the Anti Corruption Agency on 27 May 2015, well after the decision of this court was delivered on 7 October 2013. This was confirmed at the trial by the first respondent himself (DW1) who produced the search warrant SDN/Report 08/2015 as exh P5 while under cross-examination. There was therefore more than sufficient time for the respondents to comply with this court's order of 7 October 2013 if they had wanted to before the documents were seized by the Anti Corruption Agency.

[68] Truly, Zung Zang has been placed in the unenviable position of a surgeon who performs a successful but futile operation — the operation is a complete success but the patient dies. That, we have to say, cannot be how the system of justice should work in this country.

[69] That disposes of our deliberation on leave question 1. As for leave question 2 (whether a corporate representative is entitled to requisition an EGM of its subsidiary), Zung Zang's submission was that the Court of Appeal erred in holding that under s 147(3) of the Companies Act, a corporate representative is not empowered to make a requisition for an EGM of Zung Zang.

[70] The issue is intertwined with the question whether Zung Zang is 100% owned by KCHSB, which we have touched on in dealing with leave question 1. The answer to leave question 2 will answer leave 3. Section 147(3) of the Companies Act provides as follows:

> (3) A corporation may by resolution of its directors or other governing body:
>
> (a) if it is a member of a company, authorise such person as it thinks fit to act as its representative, either at a particular meeting or at all meetings of the company or of any class of members; or
>
> (b) if it is a creditor (including a holder of debentures) of a company, authorise such person as it thinks fit to at as its representative, either at a particular meeting or at all meetings of any creditors of the company,
>
> and a person so authorised shall, in accordance with his authority and until his authority is revoked by the corporation be entitled to exercise the same powers on behalf of the corporation as the corporation could exercise if it were an individual member, creditor or holder of debentures of the company.

[71] It was submitted by learned counsel for Zung Zang that the Court of Appeal had completely misconstrued s 147(3) when it held that the subsection only refers to a corporate representative acting at a particular meeting or at all meetings of the company, and does not refer to issuing notices or doing things outside of the meeting or meetings of the company.

[72] The contention was that the decision of the Court of Appeal would have the effect of encouraging or paving the way for subsidiary companies to completely ignore, disregard or reject the wishes of the holding company since the rights of any corporate representative is limited to voting at the members' meeting and does not extend to the requisitioning of a members' meeting.

[73] It was argued that since KCHSB is the sole shareholder and member of Zung Zang, the directors of KCHSB were competent and legally entitled under s 147(3) of the Companies Act to appoint PW1 to be its corporate

representative and being so appointed is entitled to exercise all powers that he was entitled to exercise.

[74] According to counsel, it would be absurd to say that such person can only act at a particular meeting or at all meetings of the company but cannot issue notices or doing things outside of the meeting or meetings of the company. Mr Norbert Yapp posed the question: If he cannot do such acts, how is the corporate member (KCHSB) of Zung Zang expected to act since it is not a living person?

[75] The Court of Appeal relied on the High Court case of *Drico Ltd v Drico (Water Specialist) Sdn Bhd (Company No 112278-M), Ismail bin Johari, Kinoshita Masao, Tam Kok Meng* [2011] MLJU 439 for the proposition that a corporate representative is only authorised to attend meetings on behalf of its appointer. In dealing with the issue of corporate representative, the High Court had noted:

> [41] From the evidence adduced by the parties, the court finds that the petitioner passed no such resolution appointing Kinoshita as its corporate representative. The respondents have not adduced any documents or evidence, such as a certificate of appointment of representative as envisaged by s 147(5), to show otherwise. Any appointment of representative or proxy must be done properly and formally in accordance with the necessary procedure. There was no such appointment in the present circumstances ...
>
> ...
>
> [43] In any event the statute itself makes it clear that a corporate representative is only authorised to attend meetings on behalf of its appointer.

[76] It is clear from the above excerpt that Kinoshita was not properly and formally appointed by the company to be its corporate representative. On the facts therefore, the High Court was right in ruling that Kinoshita had no authority to act on behalf of the company as its corporate representative.

[77] On the question as to whether a corporate representative's power is only to attend meetings on behalf of its appointer and does not extend to the requisitioning of a members' meeting, the High Court in *Drico* did not delve into the issue save to say that the statute itself makes it clear that a corporate representative is only authorised to attend meetings on behalf of its appointer. No authority was cited for the proposition.

[78] The case is clearly distinguishable from the facts of the case before us, where PW1 had been properly appointed as the corporate representative of KCHSB. The only issue is whether he had the authority in his capacity as the corporate representative of KCHSB, being the only member of Zung Zang, to

requisition for the meetings of Zung Zang, which it owns 100%.

[79] A recent decision of the High Court in *Low Thiam Hoe & Anor v Sri Serdang Sdn Bhd & Ors* [2020] 10 MLJ 137 is closer to the point. The Court of Appeal did not have the benefit of this decision, nor was the case referred to us in the course of argument.

[80] In that case the High Court gave a wider interpretation to s 147(3) of the Companies Act. Darryl Goon J (as he then was) held that the section does not preclude a corporate representative from performing any act that is not within the powers or authority prescribed by the section. The view that the learned judge took was that the act of requisitioning an EGM on behalf of a corporate member is not an act that offends or is inconsistent or incompatible with what s 147(3) is concerned with, namely, corporate representation at meetings.

[81] The appointment of the sixth defendant in that case as the corporate representative of the fifth defendant was couched in the following language:

> THAT pursuant to Section 147(3) of the Companies Act 1965, Mr Tay Say Han (NRIC No 521023–08–5443), or failing him, Encik Mohd Salleh bin Lamsin (NRIC No 550316–12–5093) be and is hereby appointed to act as the corporate representative of the company to attend, to consent to short notice (if necessary) and vote on behalf of the company at all general meetings of all subsidiary companies of the company in Malaysia and at any adjournment thereof, and without prejudice to the generality of the foregoing to exercise the same powers contained in Section 147(6) of the Companies Act, 1965.
>
> THAT such appointment shall remain effective until otherwise resolved. Dated this 2 March 2015.

[82] It was held by the learned judge that when the sixth defendant signed the requisitions for an EGM to be held by the subsidiaries, he did so pursuant to the authority conferred by the BOD of the fifth defendant and not pursuant to the powers conferred on him *qua* representative under s 147(3) of the Companies Act.

[83] We agree with the learned judge's interpretation of s 147(3) of the Companies Act. We only wish to add by way of reiteration that where a holding company owns 100% of its subsidiary and is therefore its sole corporate member, its corporate representative has the necessary authority to requisition for an EGM of the subsidiary. To accede to the construction given by the respondents to s 147(3) of the Companies Act will result in a situation where a holding company like KCHSB will find itself in the untenable position of being powerless over its subsidiary, despite being its sole or 100% owner.

[84] For all the reasons aforementioned, our answers to the leave questions are as follows:

Leave question 1 — Negative, that is to say, the list of members as reflected in the company's register is not conclusive evidence of ownership given the full effect of the Federal Court order dated 7 October 2013;

Leave question 2 — Affirmative, that is to say, a corporate representative of a holding company of a wholly owned subsidiary is entitled in law to requisition an extraordinary general meeting of the subsidiary;

Leave question 3 — Affirmative, that is to say, any resolution passed at such extraordinary general meeting would be valid by reason of ss 152(A) and 147(6) of the Companies Act 1965.

[85] In the upshot, the appeal is allowed with costs to the appellant, subject to payment of the allocator fee. The decision of the Court of Appeal is hereby set aside and the decision the High Court is restored.

Appeal unanimously allowed, decision of the COA set aside and the High Court's decision reaffirmed.

Reported by Izzat Fauzan